1989

Utah Restaurant Association v. Salt Lake City Board of Health : Brief in Opposition to Certiorari

Utah Supreme Court

David E. Yocom, Thomas L. Christensen; attorneys for appellant.
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 BRIEF

IN THE SUPREME COURT OF UTAH

UTAH RESTAURANT ASSOCIATION, a Utah non-profit corporation, UTAH RETAIL GROCERS ASSOCIATION, A Utah non-profit corporation, UTAH HOTEL-MOTEL ASSOCIATION, a Utah non-profit corporation, LAMB'S RESTAURANT, FLYING "J", UTAH FOOD & CATERING, INC., DEES FAMILY RESTAURANTS, KENTUCKY FRIED CHICKEN-HARMON'S MANAGEMENT CORP., GASTRONOMY, INC., TACO MAKER, INC., MARKET STREET GRILL, MARKET STREET BROILER, NEW YORKER RESTAURANT, HILTON HOTELS-PEARSON ENTERPRISES, SIZZLING PLATTER, INC., STAN'S MARKET, N.P.S., CRYSTAL PALACE MARKET, WHEEL-IN MARKET, THE TABLE SUPPLY, VOYLES MARKET, THE STORE, ALBERTSON'S INC., FAMILY MARKET, SAFEWAY STORES, INC., THE TANNING ENTERPRISES, 8TH AVE. MEAT & GROCERY, MACEY'S INC., BELL'S 48TH ST. MARKET, PETERSON FOODTOWN, FOOD-4-LESS, DAN'S FOODS, MONTIE'S BESTWAY, and HALE'S MARKET, Plaintiffs-Petitioners, -vs- SALT LAKE CITY-COUNTY BOARD OF HEALTH, Defendant-Respondent.	*	Case No. 890131

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI FOR THE REVIEW OF THE ORDER OF THE COURT OF APPEALS REVERSING THE ORDER OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, THE HONORABLE RICHARD H. MOFFAT, THIRD JUDICIAL DISTRICT JUDGE PRESIDING

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IN THE SUPREME COURT OF UTAH

UTAH RESTAURANT ASSOCIATION, a Utah non-profit corporation, UTAH RETAIL GROCERS ASSOCIATION, A Utah non-profit corporation, UTAH HOTEL-MOTEL ASSOCIATION, a Utah non-profit corporation, LAMB'S RESTAURANT, FLYING "J", UTAH FOOD & CATERING, INC., DEES FAMILY RESTAURANTS, KENTUCKY FRIED CHICKEN-HARMON'S MANAGEMENT CORP., GASTRONOMY, INC., TACO MAKER, INC., MARKET STREET GRILL, MARKET STREET BROILER, NEW YORKER RESTAURANT, HILTON HOTELS-PEARSON ENTERPRISES, SIZZLING PLATTER, INC., STAN'S MARKET, N.P.S., CRYSTAL PALACE MARKET, WHEEL-IN MARKET, THE TABLE SUPPLY, VOYLES MARKET, THE STORE, ALBERTSON'S INC., FAMILY MARKET, SAFEWAY STORES, INC., THE TANNING ENTERPRISES, 8TH AVE. MEAT & GROCERY, MACEY'S INC., BELL'S 48TH ST. MARKET, PETERSON FOODTOWN, FOOD-4-LESS, DAN'S FOODS, MONTIE'S BESTWAY, and HALE'S MARKET, Plaintiffs-Petitioners, -vs- SALT LAKE CITY-COUNTY BOARD OF HEALTH, Defendant-Respondent.	*	Case No. _____

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1. Does the Board have statutory authority to enact a comprehensive fee schedule to reimburse the Health Department for costs of inspecting food service establishments?

2. Does the licensing fee standard imposed by the Board constitute a tax rather than a fee?

3. Must the Board's findings of fact and conclusions of law be supported by evidence presented in a public hearing?

REFERENCES TO COURT OF APPEAL'S REPORTS

This case has been reported in 103 Utah Advanced Reports, 31, attached as Exhibit A.

JURISDICTION OF THE COURT

Petitioners appeal the order and written opinion of the Utah Court of Appeals entered on March 10, 1989, unanimously reversing the earlier judgment of the Third Judicial District Court, the Honorable Richard H. Moffatt, Third Judicial District Judge presiding.

Jurisdiction to file a petition for a writ of certiorari is conferred by Rule 42, Rules of the Utah Supreme Court.

CONTROLLING PROVISIONS

The controlling provisions of the statutes relevant to this case, sections 26-24-14, 26-24-15, 26-24-18, and 26-24-20, Utah Code Ann. (1953 as amended), are set forth in Exhibit E in the Appendix to this brief.

STATEMENT OF THE CASE

Petitioners seek to overturn the ruling of the court of appeals, reversing the district court's determination that the licensing fee standard adopted by the Salt Lake City-County Board of Health (hereafter the Board) is invalid. The appellate court did not defer to the trial court's rulings on the three questions of law decided by the district court but instead reversed them on a correction of error of standard. In essence, the court of appeals ruled that the public hearing in connection with the Board's adoption of findings of fact and conclusions of law was sufficient, that the Board had authority to impose regulatory fees, and that the licensing standard constitutes a fee rather than a tax.

STATEMENT OF FACTS

The Board adopted a licensing fee standard in order to defray some of the costs of the Salt Lake City-County Health Department's food inspection program. The licensing fee standard establishes fee categories and fee amounts arranging from $15 to $100 per year, relative to the size and complexity of the restaurants and food establishments inspected by the Health Department. (Licensing Fee Standard attached as Exhibit C).

At the time the standard was presented for public hearing, the actual cost of the food inspection program,

including personnel costs and some overhead, was estimated at approximately $430,000, and the licensing fee standard was estimated to generate $156,000. (Findings of Fact, Exhibit D).

Fees collected pursuant to the licensing fee standard, as indicated in the affidavit of auditor Nelson G. Williams, are accounted for separately from County general funds and, pursuant to section 26-24-18, are reserved in a special health department account reserved exclusively for the food inspection program. (R-162-165)

In adopting the licensing fee standard, the Board, pursuant to state law, published notice of the hearing on August 10 and 23, 1986, in the Salt Lake Tribune and the Deseret News. (R-73) A public hearing on the licensing fee standard was conducted on September 10, 1986, by a board-appointed hearing officer from the Health Department. Approximately thirty citizens appeared at the hearing, and many of those in attendance submitted oral and written comments. (R-60)

At the subsequent October 2, 1986 Board of Health meeting, the Board, having received a summary of comments from the September hearing, written comments from the public and Health Department staff, and proposed findings of fact and conclusions of law, accepted further oral arguments from private parties and Health Department staff in attendance. (R-66-72, 82) At the conclusion of the hearing, the Board,

upon the motion of board member, Dr. John Bevan, voted to accept the Health Department's recommendations and to implement the licensing fee standard. (R-71-72). One member of the Board opposed the motion and one abstained. (R-72) The Board then approved and signed findings of fact, conclusions of law, which were very similar to those previously prepared by the Board's hearing officer. (Exhibit C).

Following the adoption of a licensing fee standard, the petitioners filed this action for declaratory judgment in Third District Court to determine the validity of the licensing fee standard. Following oral argument on motions for summary judgment submitted by both parties, Honorable Third District Court Judge Richard H. Moffatt issued a minute entry on June 24, 1987, granting the petitioner's motion for summary judgment and, thereafter entered judgment in their favor on August 18, 1987. (R-161, R-191-197)

The court of appeals reversed the district court's decision on the grounds that: (1) The findings of fact and conclusions of law adopted by the Board did not have to be supported by evidence upon the record at the public hearing because it was a rule-making hearing, not governed by the limitations of an administrative adjudicative hearing, and the findings of fact and conclusions of law could be properly based on information known or secured by the Board, formally or informally; (2) the Board had statutory authority under Utah

Code Ann. section 26-24-14(14) to impose fees to defray costs of a local health department regulatory program; and (3) the charges imposed under the fee standard constituted "fees" and not "taxes" under the standards articulated by Utah Supreme Court in Utah Restaurant Assoc. v. Davis County Bd. of Health, 709 P.2d 1161 (Ut. 1985).

SUMMARY OF ARGUMENT

Petitioners request review of this case pursuant to Rule 43(4), Rules of the Utah Supreme Court:

> The following, while neither controlling nor wholly measuring the court's discretion, indicate the character of reasons that will be considered:
>
> ...(4) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by this court.

While it is undisputed that the questions decided in this case are important questions (for example, the Health Department alone receives over $1 million per year from regulatory fees, R-125), this case does not involve questions which have not been, but should be, settled by this court. This court has already decided the issues presented in this petition on numerous occasion, including a recent case involving a nearly identical restaurant fee structure provision adopted by the

Davis County Board of Health. Unfortunately, the trial court ignored and supplemented the procedural and substantive requirements of the Local Health Department Act as interpreted by this court, choosing instead to create a type of "user fee" standard for review and requiring a full-blown evidentiary hearing to support the adoption of regulatory fees. As recognized by the appellate court, the trial court's holdings are unsupported by statute and the clearly established common law precedents of this state. In light of petitioner's failure to demonstrate the absence of, or need for, court direction on the questions presented for appeal, this case is inappropriate for review and petitioners' writ should be denied.

ARGUMENT FOR DENIAL OF WRIT OF CERTIORARI

POINT I.

THE BOARD HAS STATUTORY AUTHORITY TO ENACT A COMPREHENSIVE FEE SCHEDULE TO REIMBURSE THE HEALTH DEPARTMENT FOR COSTS OF INSPECTING FOOD SERVICE ESTABLISHMENTS.

In the lower court proceedings, both the trial court and the court of appeals recognized that a local board of health has delegated authority pursuant to section 26-24-14(14), U.C.A. (1953, as amended), to establish and collect appropriate fees. (Opinion of the Court of Appeals, Exhibit A, page 8; District Court Findings of Fact and

Conclusions of Law, Exhibit B, page 5). Both courts reached this conclusion based on section 26-24-14 which authorizes a local health department to "establish and collect appropriate fees...for public health purposes." The trial court, however, viewed section 26-24-14(14) very narrowly, ruling that this section

> refers only to the charging of fees for such minor items as preparing certificates, copying fees, and similar fees for specific services to particular persons for their specific benefit, such as have been traditionally imposed by governmental bodies. The statute does not authorize defendant to attempt to offset substantial portions of its total costs, including salaries and overhead involved in particular programs, through the imposition of such charges. [Exhibit B, p. 5]

The court of appeals rejected the trial court's restrictive definition, ruling that there is not "the slightest hint" that the legislature intended to restrict fees to minimal charges for clerical or administerial services. The appellate court pointed out that, in addition to section 26-24-14(14), section 26-24-15(1) of the Local Health Department Act expressly provides that "money available from fees...may be used to establish and maintain local health departments." The appellate court also noted that section 26-24-18 provides that fees for local health purposes must be expended only for maintenance and operation of a local health department.

(Complete text of the above statutes is contained in the Appendix to this brief). The court concluded that since there is every indication from the statutory language that the legislature intended fees to be used along with other funds for operating and maintaining a local health department, and there is no indication whatsoever that fees are to be limited to the purposes specified by the trial court; local boards of health are statutorily authorized to impose charges to defray the cost of a regulatory program.

In an attempt to produce a statutory basis for their position, petitioners compare the grant of authority given local boards of health to "establish and collect fees" with the grant given the State Department of Health to adopt fee schedules, "submitted to and approved by the Legislature as part of the department's annual appropriations request." See section 26-1-6, U.C.A. (1953, as amended). Petitioners conclude that since local boards of health are not also required to submit their fee schedules to the legislature for prior approval, the Board's power to assess fees is somehow limited. This argument was not a basis for the trial court's ruling and reflects a basic misunderstanding of the budget process of local government agencies. County budgets operate independently of the state process with the County Commission rather than the legislature reviewing and setting budget standards for county agencies. (See section 26-24-4, "The

governing body of each county shall create and maintain a local health department.") Recognizing once again that the legislature has authorized the collection of fees to maintain local health departments, it is unreasonable to argue that local health departments are preempted or limited in their ability to collect fees merely because of the existence of a statute governing the adoption of fees by the State Health Department.

The legal question of whether a local board has authority to adopt fees to defray the cost of a regulatory program is settled law and, therefore, inappropriate for review by a writ of certiorari under Rule 43(4), Rules of the Utah Supreme Court. This court has already concluded on a number of occasions that counties, and, specifically, local health departments, have authority to establish and collect appropriate fees. In Utah Restaurant Assoc. v. Davis County Bd. of Health, 709 P.2d 1159 (Ut. 1985), this court, in reviewing a nearly identical fee regulation schedule, ruled that a board has authority under section 26-24-14(14), U.C.A. (1953, as amended), to assess appropriate fees. This court stated that in order for a local board of health to charge fees, "authority must be conferred on it by the county which created it, acting within its lawful authority, or by the legislature." Id. at 1164. This court then referred to section 26-24-14(14) as the "pertinent provision" which gives a

local health department authority to establish and collect fees. Having concluded that the legislature had authorized fee collection, this court then considered whether the "fee" adopted in Davis County was a fee or a tax and whether the Board complied with procedural requirements for establishing a fee, the identical issues raised in this petition.

This court in Mtn. States Telephone and Telegraph Co. v. Salt Lake County, 702 P.2d 113 (Ut. 1985); Consolidated Coal Co. v. Emery Co., 702 P.2d 121 (Ut. 1985); and Smith v. Carbon County, 63 P.2d 259 (Ut. 1953), acknowledged the authority of counties, not just cities, to enact regulatory fees to defray costs of inspection and related expenses. In Mtn. States Telephone & Telegraph Co. supra at 118, this court recognized a county's authority to regulate the use of public roads and to charge reasonable fees to defray the cost of regulation. In Consolidated Coal, supra at 127, this court affirmed the holding in Cache County v. Jensen, ruling that counties may raise revenue through licensing "insofar as such revenue is necessary to (and, therefore proportionate to the cost of) regulation of the licensed entities." Further, in Smith, supra at 263, this court recognized Carbon County's ability to charge fees for services in probate proceedings subject to the condition that "the amount of fees must be exact and must bear some reasonable relation to the extent and nature of the services rendered."

Petitioners did not cite one Utah case which stands for the position that counties, or local boards of health created by counties, lack authority to assess fees or that fees must be limited to user fees "for specific services to particular persons to their specific benefit." (District Court Findings, Exhibit B.) The only cases cited were those in which this court ruled that counties have no right to tax merely for revenue, for example Consolidated Coal and Mtn. States Telephone and Telegraph Co. The Board agrees that it has no authority to levy a revenue producing tax. However, as discussed in the cases previously cited and those discussed in the next section of this brief, this court has ruled that counties and agencies such as a local board of health may adopt regulatory fees to defray the cost of a regulatory program. Recognizing that this is a clearly settled question of law, petitioners writ on this issue should be denied.

POINT II.

THE LICENSING FEE STANDARD IMPOSED BY THE BOARD CONSTITUTES A FEE RATHER THAN A TAX.

Petitioners contend that the law with respect to determining whether a regulatory or licensing fee schedule is a fee or a tax is also unsettled by this court. Such a claim is erroneous in view of the large body of law, including recent pronouncements by this court, on this very issue.

In Utah Restaurant Association, supra at 1164, this court discussed the relevant factors to be considered in determining whether a regulatory fee schedule amounts to a tax. The two factors mentioned are "whether the measures have been designed to defray some or all of the costs of inspecting the food establishment on which it is imposed" and whether "there is some assurance that the money collected will be used to defray those costs." By evaluating a local board's finding of fact and conclusions of law in light of these standards, this court remarked that a reviewing court should have "little difficulty" determining whether a fee schedule constitutes a fee or a tax. Id.

Despite the clear standards articulated in Utah Restaurant Association, petitioners seek to create their own standard of review. Their standard, which was apparently accepted by the trial court, is based on a pure "user fee" theory in which all fees are considered taxes unless the recipient of government services requests and is specifically benefitted by the services. In support of this theory, petitioners refer to subdivision "impact fee" cases where this court has articulated specific factors to be considered in determining the "reasonableness" of the impact fee. (See e.g., Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 903 (Ut. 1981). Clearly, the focus of these impact fee cases is not on the standard for determining whether the exaction is a

fee or a tax but whether the exaction is fair and reasonable, which is not a question presented for review in this case. Not one of the cases cited by plaintiffs hold that an inspection fee, designed to defray some or all of the costs of an inspection program, is essentially a tax.

Unable to locate any supporting Utah cases on this issue, petitioners turn to Nat'l Cable Television Assoc. v. U.S., 94 S.Ct. 1146, 415, U.S. 336, 39 L.Ed 2d 370 (1974), where the Supreme Court ruled that certain FCC fees are allowable only if the fees fairly taken into consideration the value of the services to the recipient. (415 U.S. at 337). As in the impact fee cases cited by petitioners, the language excised from Nat'l Cable is out of context and does not apply to regulatory fee cases in general. Nat'l Cable deals with a federal statute which specifically requires consideration of the value of services provided to cable television operators as a prerequisite to the imposition of charges. No similar statutory requirement exists for a board's enactment of regulatory fees. Rather, the Local Health Department Act, section 26-24-14(14), limits the imposition and collection of fees to "public health purposes." Obviously, public health concerns justify the implementation of a restaurant inspection program; otherwise, a health department has no business conducting the food inspections. Benefits to private industry

are only incidental to the public purposes necessitating the regulation.

Petitioners not only ignore the holding in Utah Restaurant Association but the other Utah cases in which this court has distinguished fees from taxes. For example, in Best Foods, Inc., v. Christensen, 285 P.1001 (Utah 1930), this court reviewed a Utah statute requiring manufacturers and retailers of margarine to pay an inspection fee or an annual license. The plaintiff in Best Foods contended that the statute was invalid because the fee actually amounted to a tax. This court, noting that a license "tax" upon the inhabitants of the city enacted for the sole purpose of raising revenue is improper, declared that

> it is well settled that a law which was enacted to protect a public interest or defend against a public wrong is not a tax, although it requires the payment of a license fee to bear the expense of carrying out its provisions. Supra at 1004. [emphasis added].

Since the purpose of the fee in the Best Foods case was to offset the costs of the service rendered, the court upheld the imposition of the license fee. Likewise, in Weber Basin Homebuilders Assoc. v. Roy City, 487 P.2d 866, (Utah 1971), this court distinguished license fees from taxes according to the purpose of the fee:

> If the money collected is for a license to engage in a business and the proceeds therefrom are mainly to service, regulate and police such business or activity, it is regarded as a license fee. On the other hand, if the factors just stated are minimal and money collected is mainly for raising revenue for general municipal purposes, it is properly regarded as the imposition of a tax, and this is so regardless of the terms used to describe it.

The many Utah cases referenced by the Board and the petitioners all affirm the holding articulated above and substantiate the Board's position that this is a clearly settled area of law. For these reasons, petitioners' writ on this second issue should be denied.

POINT III.

THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW NEED NOT BE SUPPORTED BY EVIDENCE PRESENTED IN A PUBLIC HEARING.

Petitioners contend that since local boards of health are required by statute to file findings of fact and conclusions of law when adopting a regulation, boards must also conduct a thorough evidentiary hearing to establish a record in support of their findings of fact and conclusions of law. In effect, petitioners contend that the type of hearing mandated by the Act for rule making proceedings is a trial-type hearing.

In light of the purpose of the public hearing requirement for rule making proceedings, it is unreasonable to conclude that the legislature intended a trial-type hearing. Obviously, the purpose of such hearings is to give the public the opportunity to comment and thereby influence the board of health in its decision to adopt, revise, or reject a regulation. The public hearing is not designed to give residents the opportunity to cross-examine the Board or other residents who may wish to speak at the hearing or to be confronted with all of the evidence which is to be presented to, or considered by, the board. In this respect, the hearing is markedly different from an adjudicatory proceeding where, as indicated in the cases cited in the petitioners' brief, parties have the right to cross-examine witnesses, and where the only evidence or testimony which may be considered is that produced at the hearing. Contrary to petitioners' assertion, "notice and comment" type hearings are not meaningless. It goes without saying that there is value in receiving citizen input on government programs that directly impact regulated industries and the general public.

As mentioned, the only basis for concluding that a trial-type proceeding is required is the language in the Local Health Department Act requiring findings of fact and conclusions of law. However, in evaluating the provisions of the Act, this court observed that

> Section 26-24-20 is confusingly written and deals with two distinct subjects--rule making by a board and enforcement actions by a department. Subparts (1) through (3) of section 26-24-20 specify the steps that a board must go through in promulgating rules and regulations or standards. Utah Rest. Ass'n, supra. at 1161 [emphasis added]

Thus, despite the findings of fact and conclusions of law requirement in subsection (3), this court recognizes that sections (1) through (3) address a rule making procedure rather than a trial-type enforcement action. Such were also the findings of the court of appeals on this issue. (Opinion of the Court of Appeals, Exhibit A, p. 5).

Recognizing that the cases and authorities referenced in petitioner's brief deal with enforcement or adjudicatory actions rather than rule making proceedings, it is unnecessary to specifically discuss each case or authority. For example, petitioners cite 2 Am. Jur. 2d Administrative Law, §444 in their brief in support of the position that an administrative decision may not be based on the decision maker's "own knowledge, secret staff input, or other evidence outside of the hearing." (Petitioners' Brief, p. 18). Yet, Section 283 of the same administrative law section of Am Jur, which relates to rule making procedures, speaks of a very informal hearing process designed for consultation and enlightenment rather than

closed issue adjudication. Likewise, the other cases and authorities cited by petitioners in their brief deal with trial-type proceedings and do not stand for the position that full-blown evidentiary hearings are required in rule making proceedings.

The issues in this case are essentially the same as those presented to this court in the earlier Davis County case. In the Davis County case, this court did not require the type of evidentiary proceeding suggested by the petitioners. Rather, this court required strict compliance with the procedures outlined in the Local Health Department Act. Unlike the Davis County Board of Health in the earlier case, the Salt Lake City-County Board of Health has meticulously complied with the intent and the specific provisions of the Local Health Department Act. In addition, the Board has complied with the court's advice given in the Davis County case relative to the preparation of findings of fact and conclusions of law. See Utah Restaurant Assoc. supra. at 1164. Since the procedural requirements of the Act have already been addressed and clarified by this court and the Board is in full compliance; there is no need for further review by this court. The Board respectfully requests that petitioners' writ be denied.

DATED this 5th day of May, 1989.

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Attorney for Respondent

(jp/52+)

A P P E N D I X

EXHIBIT A

IN THE UTAH COURT OF APPEALS

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Utah Restaurant Association, a Utah non-profit corporation; Utah Retail Grocers Association, a Utah non-profit corporation; Lamb's Restaurant; Flying Dees Family Restaurants; Kentucky Fried Chicken-Harmon's Management Corp.; Gastronomy, Inc.; Taco Maker, Inc.; Market Street Grill; Market Street Broiler; New Yorker Restaurant; Hilton Hotels-Pearson Enterprises; Sizzling Platter, Inc.; Stan's Market; N.P.S.; Crystal Palace Market; Wheel-In Market; The Table Supply; Voyles Market; The Store; Albertson's, Inc.; Family Market; Safeway Stores, Inc.; Tanning Experience; O.P. Skaggs #1; SAB Enterprises; 8th Avenue Meat & Grocery; Macey's, Inc.; Bell's 48th St. Market; Peterson Foodtown; Food-4-Less; Dan's Foods; Montie's Bestway; and Hale's Market,	OPINION (For Publication) Case No. 870420-CA
Plaintiffs and Respondents,	
v.	
Salt Lake City-County Board of Health,	
Defendant and Appellant.	

FILED

MAR 10 1989

Mary T Noonan
Clerk of the Court
Utah Court of Appeals

Third District Court, Salt Lake County
The Honorable Richard H. Moffat

Attorneys: David E. Yocom, Thomas L. Christensen, Salt Lake City, for Appellant
Gary E. Atkin, Salt Lake City, for Respondents

Before Judges Davidson, Bench, and Jackson.

JACKSON, Judge:

The Salt Lake City-County Board of Health (the "Board"), seeks reversal of a declaratory judgment holding its food service establishment inspection fee regulation, adopted under the Local Health Department Act (the "Act"),[1] legally invalid. We reverse.

The Board is a non-elected body appointed by the Salt Lake City and County Commissioners to act as a local board of health. Its powers and duties are set forth in the Act. See Utah Code Ann. § 26-24-14 (1984). At a June 1986 meeting, the Board discussed reviving a plan to initiate an inspection fee to be paid by "food service/food establishment" businesses. Staff members presented information about inspection fee classifications and schedules in several nearby states and estimated the health department was spending $600,000 to inspect food establishments at least twice yearly as required by Utah State Food Service Regulations. The Board voted to hold a public hearing on the inspection fee proposal. A fee schedule (referred to as the "fee standard") was drafted, listing categories of food establishments and setting annual inspection fees that ranged from $40 to $100, depending on the number of service bays, or the number of seats, or square footage. The dollar amounts, categories, and definitions in the proposed standard were prepared and adopted based upon recommendations of the department's staff and the Board's deliberations.

After publication of notice in local newspapers and a thirty-day period for public comment, during which copies of the proposed fee schedule and regulation were made available to the public, a public hearing was held on September 10, 1986, at which approximately 30-40 people submitted oral and written comments. There was no testimony or written evidence submitted at this public hearing showing the basis for the food establishment categories or fee amounts set forth in the proposed inspection fee schedule. Health department staff prepared a document summarizing and responding to the criticisms of the proposed schedule made at the public hearing. The Board also prepared a draft of its findings of fact, conclusions of law, and order, required by Utah Code Ann. § 26-24-20(3) (1984) as part of the rulemaking process. See Utah Restaurant Ass'n v. Davis County Bd. of Health, 709 P.2d 1159 (Utah 1985).

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1. Utah Code Ann. §§ 26-24-1 through -24 (1984).

At its October 2, 1986, meeting, Board members again discussed the fee schedule among themselves and heard additional input from representatives of affected food establishments. The Board then voted to institute the fee program and adopted the prepared findings, conclusions, and order, in which it found there was no information put forth by critics demonstrating that the proposed fee was either unlawful, excessive, not tied directly to the cost of the inspection program ($453,000), or not to be used solely to support that program. It also specifically found that the proposed fees were reasonable and that they would raise $156,000, approximately one-third of the annual cost of the inspection program. With regard to the use of the new fees, the Board stated:

> 9. Money collected by the proposed fee will be deposited in an account of the Health fund set up specifically to receive monies generated by the proposed standard.
>
> 10. Funding to support the Food Inspection Program will be drawn from the account mentioned above in Item #9.

The respondents subsequently filed this declaratory judgment action[2] to challenge the fee regulation's constitutionality and validity. After the parties stipulated to undisputed facts regarding the sequence of events and the basis for the Board's findings and conclusions, three issues were submitted for determination on cross-motions for summary judgment and ruled on.[3]

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2. Utah Code Ann. §§ 78-33-1 through -13 (1987). See Utah Restaurant Ass'n v. Davis County Bd. of Health, 709 P.2d 1159, 1161 (Utah 1985) (rules of county board of health constitute "municipal ordinance" whose construction or validity can be challenged in a declaratory judgment action).

3. The respondents also contended the Board had not complied with the statutory procedural requirements in imposing the fees, presumably for unarticulated reasons other than the lack of evidence at the hearing to support the findings and fee schedule. However, the trial court did not rule on this as a separate issue, and it has not been raised in this appeal.

The trial court held the fee regulation invalid and void ab initio on each of the asserted grounds: (1) the findings of fact and conclusions of law adopted by the Board on October 2, 1986, are not supported by evidence presented at the public hearing held September 10, 1986, contrary to the requirements of the Act; (2) despite its label, the inspection "fee" is invalid because it constitutes a tax, which the Board is not statutorily authorized to levy; and (3) even if it is not a tax, the Act does not authorize the Board to impose fees in the form of charges on food establishments to defray the costs of the food establishment inspection program.

The Board contends the trial court erred on all three points. On appeal, we do not defer to the trial court's rulings on these questions of law. Instead, we review them under a correction of error standard. E.g., Creer v. Valley Bank & Trust Co., 97 Utah Adv. Rep. 12 (Dec. 9, 1988); Western Kane County Spec. Serv. Distr. No. 1 v. Jackson Cattle Co., 744 P.2d 1376 (Utah 1987).

VALIDITY OF BOARD FINDINGS

Section 26-24-20(1) of the Act gives the Board authority to enact rules, regulations, or standards "necessary for the promotion of public health . . . and the prevention of outbreaks and spread of communicable and infectious diseases. . . ." However, the Board is required to provide public hearings prior to any such enactment. See Utah Code Ann. § 26-24-20(2) (1984). Subsection (3) states:

> The hearings may be conducted by the board at a regular or special meeting, or the board may appoint hearing officers, who shall have power and authority to conduct hearings in the name of the board at a designated time and place. A record or summary of the proceedings of any hearing shall be taken and filed with the board, together with findings of fact, conclusions of law, and the order of the board or hearing officer. In any hearing, a member of the board or the hearing officer shall have power to administer oaths, examine witnesses, and issue notice of the hearings or subpoenas in the name of the board requiring the testimony of witnesses and the production of evidence relevant to any matter in the hearing.

Utah Code Ann. § 26-24-20(3) (1984). Respondents do not assert a complete lack of any basis for the proposed fee schedule. Instead, respondents contend this section of the Act requires the findings of the Board to be supported by at least some evidence introduced at the required public hearing "or the mandate for a public hearing is worthless." The parties agree that the Board's fee standards were prepared on the basis of information provided by health department staff to the Board before the public hearing and not on the basis of evidence submitted at the public hearing. Therefore, respondents argue, the findings and the fee schedule are invalid.

In effect, respondents contend that the public hearing mandated by the Act during rulemaking is a trial-type hearing. They claim they were not fully informed of the information submitted to and considered by the Board; they complain they did not have the opportunity to offer rebuttal evidence or cross-examine everyone submitting information to the Board. Those are the main elements of a trial. The trial court accepted this argument and held that the statute limited the rulemaking process to consideration of "evidence" presented at the September 10, 1986, public hearing. We conclude this is an erroneous interpretation of the statute's requirements.

An inspection fee adopted by a local board of health was also at issue in Utah Restaurant Association v. Davis County Board of Health, in which the fee standard was invalidated because the board had failed to comply with the statutory requirement that findings of fact and conclusions of law be filed. In thus applying the clear letter of the law, the court noted that such a requirement is normally associated only with the adjudication of a claim, not with rule promulgation. Id. 709 P.2d at 1164.

In interpreting this provision of the Act, the Utah Supreme Court clarified that subsections (1) through (3) of section 26-24-20 delineate the steps which a local board must follow in its rulemaking process. Id. at 1161. In contrast, subsections (4) through (6) of the same section apply to enforcement actions by a local health department. Id. It is apparent that, despite the use of terms normally employed in a trial context, subsections (1) through (3) create a "notice and comment" public hearing rulemaking process, not a trial-type procedure.

There is no question that notice and opportunity to be heard were provided to the public in accordance with the statute. It is also apparent respondents had a full and fair opportunity to present evidence to the Board supporting their claims that the fee is unnecessary and burdensome and that the

fee schedule is unreasonable in the way it categorizes food establishments. The text of the proposed fee schedule, drafted based on information provided to the Board by its staff, was made available to the public during the comment period. The public hearing was conducted by a health department staff member as hearing officer, and three other representatives of the department were present. Oral statements and written comments were received from various organizations and individuals, including many of the respondents and their legal counsel. Attendees were informed that a summary of the hearing and written comments would be submitted to the Board before its regular meeting on October 2, 1986, and that interested parties could attend that meeting and make additional comments. The Board's staff prepared and submitted written responses to the comments made at the September public hearing. Representatives of the respondents and their legal counsel appeared at the October 2 meeting and made further arguments to the Board prior to its final adoption of findings, conclusions of law, and an order approving the fee regulation.

The foregoing process comports with the procedure prescribed in the statute. Further, the Board's procedures were in accord with the purpose of a public rulemaking hearing, i.e., to afford interested persons an opportunity to submit written data, views, and arguments regarding why the proposed regulation should or should not be adopted. See Colorado Auto & Truck Wreckers Ass'n v. Department of Revenue, 618 P.2d 646, 652 (Colo. 1980) (in which the statute described the purpose of the mandatory public hearing in these terms).

> Hearings in administrative rulemaking procedure are usually either investigatory or designed to permit persons who may not have been reached in a previous process of consultation and conference to come forward with evidence or opinion. The purpose is not to try a case, but to enlighten the administrative agency, and to protect private interests against uninformed and unwise action.

2 Am. Jur. 2d Administrative Law § 283 (1962).

Section 26-24-20(3) cannot properly be said to require an adversarial, trial-type hearing when there is no requirement that the Board's rulemaking be based solely on a trial-type

record.[4] The statute does not say evidence must be produced at the hearing and upon such evidence the Board shall make written findings. Although the statute authorizes the Board or its hearing officer to take testimony and compel witnesses to attend or produce relevant "evidence" at the public hearing, it does not say the Board shall act only on the basis of such "evidence" or the record compiled exclusively at the public hearing. In addition, contrary to the trial court's reading of the statute, it imposes no affirmative duty on the Board to submit evidence at the public hearing in support of its own proposed fee regulation. See Long v. Department of Nat. Res., 118 Ohio App. 369, 195 N.E.2d 128 (1963).

In short, although the Board must consider all material presented to it during the public comment period and at the public hearing that is relevant to a proposed rule or regulation, the Act does not restrict it to acting only on such data or testimony when finally adopting rules or regulations. See State v. Hebert, 743 P.2d 392, 397 (Alaska App. 1987); International Council of Shopping Centers v. Oregon Envtl. Quality Comm'n, 27 Or. App. 321, 556 P.2d 138 (1976). It may rely on its own experience, its expertise, and any facts known to it from whatever source they are drawn. See 1 K. Davis, Administrative Law Treatise § 6.17 (2d ed. 1978); see also International Council of Shopping Centers, 566 P.2d at 141 (agency involved in informal

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4.

> Trial procedure is inappropriate on nonfactual issues, on issues of law or policy, and on issues of broad legislative fact. Trial procedure is especially inappropriate for untangling jumbles of policy, law, discretion, and legislative fact. The reason for not using trial procedure is that such procedure is not intrinsically designed for nonfactual issues; much administrative experience proves that trial procedure to resolve issues other than issues of adjudicative fact or specific legislative fact is wasteful, cumbersome, expensive, and unhelpful. No trial judge would use trial procedure to resolve a nonfactual issue. Neither should an agency.

3 K. Davis, Administrative Law Treatise § 14.3 (2d ed. 1980).

rulemaking can properly rely on data gathered from publications in its field, interviews, input from advisory committees, or even information informally obtained). It follows that adverse public input, once considered by the Board, may be disregarded even if unrebutted by testimony or evidence presented at the public hearing. See Colorado Auto & Truck Wreckers Ass'n, 618 P.2d at 652.

The trial court erred in holding the Board's findings of fact and conclusions of law invalid under the Act.

AUTHORIZATION TO IMPOSE FEES

A local board of health has no inherent power to charge fees or levy taxes of any kind. Utah Restaurant Ass'n v. Davis County Bd. of Health, 709 P.2d at 1163-64. "Any such authority must be conferred on it by the county which created it, acting within its lawful authority, or by the legislature." Id. at 1164. In this case, the Board contends it is authorized to impose an inspection fee under its statutory grant of powers. In ruling that the inspection fee constituted either an impermissible tax or an unauthorized fee, the trial court focused only on section 26-24-14(14) of the Act, which gives a local health department authority to

> establish and collect appropriate fees, to accept, use and administer all federal, state, or private donations or grants of funds, property, services, or materials for public health purposes, and to make such agreements, not inconsistent with law, as may be required as a condition to receiving such donation or grant[.]

The trial court concluded this provision does not authorize the Board to offset a portion of the costs involved in particular programs through the imposition of fees for that program. According to the trial court, the term "fees" in this section refers only to charges for "such minor items as preparing certificates, copying fees, and similar fees for specific services to particular persons for their specific benefit . . . ." We do not agree.

The term "fees" is used three times in the Local Health Department Act. In addition to section 26-24-14(14), section 26-24-15(1) provides for apportionment of the local health department costs among participating counties and municipalities and states that "money available from fees, contracts, surpluses, grants, and donations may be used to establish and maintain local health departments." Moneys received from these sources, including "fees . . . for local

health purposes, "are credited to a health department fund which must be expended only for maintenance and operation of the local health department. Utah Code Ann. § 26-24-18 (1984).

In all three sections of the Act, fees are grouped with several other means of providing funds for establishing, maintaining, and operating a local health department, including its various programs designed to promote and protect public health. There is not the slightest hint that the legislature intended to restrictively define "fees" as involving only minimal charges for clerical or ministerial services.[5] We therefore conclude that a charge imposed by a local board on health department program participants to defray the costs of the program is a "fee" within the purview of the Act.

FEE OR TAX?

Whether or not the particular food establishment inspection fee regulation adopted by the Board is a "tax," not authorized by the Act, turns on the actual purpose for its adoption. See Utah Restaurant Ass'n, 709 P.2d at 1164.

> If the money collected is for a license to engage in a business and the proceeds therefrom are purposed mainly to service, regulate and police such business or activity, it is regarded as a license fee. On the other hand, if the factors just stated are minimal, and the money collected is mainly for raising revenue for general municipal purposes, it is properly regarded as the imposition of a tax, and this is so regardless of the terms used to describe it.

Weber Basin Home Builders Ass'n v. Roy City, 26 Utah 2d 215, 487 P.2d 866, 867 (1971) (footnote omitted). See Provo City v. Provo Meat & Packing Co., 49 Utah 528, 165 P. 477, 479 (1917) (municipality may charge meat sellers fees to cover costs of inspection and policing of meat sales).

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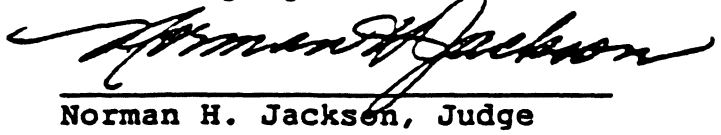
5. The record before the Board shows that other fees are regularly charged by the health department to offset the costs of mandatory immunizations, as well as for inspections under the asbestos and solid waste programs.

In Utah Restaurant Association, which involved a similar inspection fee regulation adopted by a local board of health, the food establishments also claimed the fee was invalid as a tax. The Utah Supreme Court did not need to reach this issue, however, because the regulation was invalidated on the alternative basis, noted above, i.e., the board's failure to file the requisite findings of fact and conclusions of law. Utah Restaurant Ass'n, 709 P.2d at 1164. Nonetheless, the court proceeded to issue an advisory opinion describing factual findings by the board that would provide information supporting a conclusion that its charge for inspecting food establishments was a valid fee instead of a tax. See id. First, has the regulation been designed to actually defray some or all of the costs of inspecting the food service establishments on which it is imposed? Second, is there some assurance that the money collected will actually be used to defray those costs? With adequate answers to these questions, a reviewing court can more easily determine the true nature of the enactment, see id., and make the distinction drawn in Weber Basin Home Builders Association, supra.

Here, the record demonstrates the Board acted to comply with the advice in Utah Restaurant Association when it adopted findings of fact and conclusions of law. The Board specifically found the actual cost of the food establishment inspection program to be $453,000, of which only $156,000 would be paid for by the proposed fees. The balance was to be raised through food handler permits and general taxes. The Board's findings, conclusions, and order require the collected inspection fees to be deposited in a special account, to be drawn upon to support the food establishment inspection program. Furthermore, the record before the Board clearly shows that the inspection fees were earmarked for the inspection program and could be spent for no other purpose, a fact reiterated before the district court in the unrefuted affidavit of a deputy county auditor. Respondents did not submit any controverting evidence or information on these matters to the Board or to the trial court.

In light of the purpose of the inspection fee program, its partial funding by fees imposed on the inspected food establishments, and the restricted use of the collected fees, we conclude the inspection fee regulation adopted by the Board was not invalid as an unauthorized tax. The trial court's ruling to the contrary was in error.

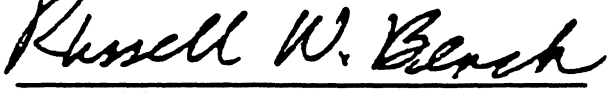
The judgment of the trial court is reversed.



Norman H. Jackson, Judge

WE CONCUR:

Richard C. Davidson, Judge



Russell W. Bench, Judge

EXHIBIT

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Telephone: (801) 521-2552

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

UTAH RESTAURANT ASSOCIATION, a Utah non-profit corporation, et al.,

Plaintiffs,

v.

SALT LAKE CITY-COUNTY BOARD OF HEALTH,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Civil No. C86-9024
(JUDGE MOFFAT)

The above-entitled matter came on regularly for hearing before the above-entitled Court, the Honorable Richard H. Moffat, Judge, presiding; and plaintiffs being represented by their counsel, Gary E. Atkin, Esq., and defendant being represented by its counsel, Thomas L. Christensen, Esq., Deputy Salt Lake County Attorney; and the parties having submitted the matter to the Court upon a Stipulation of Facts and Issues for Determination both parties having submitted their Memoranda of Points and Authorities and Reply Memoranda in support of their respective positions; and the matter having been fully argued to the Court and the Court having reviewed the Memoranda, as well as the pleadings, affidavits, Stipulation of Facts and Issues, and other

documents filed of record; and the Court now being fully informed in the premises, does hereby make and enter the following:

FINDINGS OF FACT

1. Plaintiff associations, the Utah Restaurant Association, Utah Retail Grocer's Association, and Utah Hotel-Motel Association, are non-profit corporations, duly organized and existing under the laws of the State of Utah, with their principal places of business in Salt Lake County, and whose memberships are composed of persons, corporations, partnerships, and other entities engaged in, associated with, or having a direct interest in the restaurant and food service industry in the state of Utah, whose memberships includes numerous persons whose businesses are operated within Salt Lake County, and which are subject to the "Food Service/Food Establishment Licensing Fee Standards" (the "fee standard") involved in this action. Each of those associations is a person within the meaning of Utah's Declaratory Judgment Act, Sections 78-33-1, et seq., Utah Code Anno. (1953), as amended, and Utah's Administrative Rulemaking Act, Section 63-46a-1, et seq., Utah Code Anno. (1953), as amended. Each plaintiff is entitled to the relief sought under those Acts.

2. The remaining plaintiffs are also persons subject to, and whose legal relations are affected by, the fee standard and are persons within the meaning of the Declaratory Judgment Act, Sections 78-33-1, et seq., Utah Code Anno. (1953), as amended, as

well as within the Utah Administrative Rulemaking Act, Section 63-46a-1, et seq., Utah Code Anno. (1953), as amended.

3. The Salt Lake City-County Board of Health (the "Board") is a non-elected body, appointed by the Salt Lake City and County Commissioners to act as a local board of health pursuant to the provisions of Sections 26-24-1, et seq., Utah Code Anno. (1953), as amended, which provisions specify the statutory powers and duties of the Board.

4. The Board, as a separate body, is amenable to suit and is subject to the jurisdiction and process of this Court, pursuant to Sections 63-46a-13, Utah Code Anno. (1953), as amended, and Section 78-33-1, et seq., Utah Code Anno. (1953), as amended.

5. This is an action brought by plaintiffs pursuant to the provisions of the aforesaid Sections and Rule 57, Utah Rules of Civil Procedure, for a declaratory judgment to determine the validity and constitutionality of the "Food Service/Food Establishment Licensing Fee Standards" adopted by the Board.

6. The exhibits attached to the Stipulation of the parties as subsequently supplemented by the parties, reflect all meetings of the Board relative to the fee standard and the times, places and purposes of those meetings, as well as all actions taken comments made, and other input presented at those meetings, and all notices thereof, which were considered in the formulation of the Board's Findings of Fact and Conclusions of Law relative to the adoption of the fee standard.

7. Except as referred to in Paragraph 6, there are no other items of testimony, documents, papers, Findings of Fact, Conclusions of Law, or Orders of the Board regarding the proposal and adoption of the fee standard.

8. The inspections contemplated in the fee standard constitute no change from the inspections previously conducted, except that previous inspections were paid with Health Department funds.

9. Fees collected by defendant pursuant to the fee standard have not been expended but have been deposited into a Health Department fund and are reflected, for bookkeeping purposes, as a credit to a separate discretionary Health Department account, which does not reflect deposits from any other source. Defendant intended that this account would be used to pay for a portion of the food inspection program or, if the court should so direct, to provide a refund to the persons making the payments.

10. The dollar amounts, categories and definitions applied in the "Food Service/Food Establishment Licensing Fee Standards" were prepared and adopted based upon recommendations of the Health Department staff. The Board made its determination, based upon the recommendations of staff and its own deliberations, that the dollar amounts, categories and definitions were reasonable. There was no public input regarding those dollar amounts, categories and definitions.

11. There are no existing genuine issues as to any material fact relevant to this action which would require an evidentiary hearing.

BASED UPON the foregoing Findings of Fact, the Court does hereby make and order the following:

CONCLUSIONS OF LAW

1. Defendant does not have the authority to impose charges as specified in the "Food Service/Food Establishment Licensing Fee Standards" for food service establishments pursuant to the provisions of Section 26-24-1, et seq., Utah Code Anno. (1953), or otherwise. Section 26-24-14 (14), Utah Code Anno. (1953 refers only to the charging of fees for such minor items as preparing certificates, copying fees, and similar fees for specific services to particular persons for their specific benefit, such as have been traditionally imposed by governmental bodies. The statute does not authorize defendant to attempt to offset substantial portions of its total costs, including salaries and overhead involved in particular programs, through the imposition of such charges. Therefore, since defendant was acting in excess of its statutory authority in attempting to impose those charges, they should be declared to be invalid, and null and void ab initio.

2. The Findings of Fact and Conclusions of Law as adopted by defendant are unsupported by the evidence presented at the public hearing of September 10, 1986, relative to the adoption of its "Food Service/Food Establishment Licensing Fee Standards" for

food service establishments. While the Court recognizes that defendant is not bound by the evidence presented at such public hearings, the Findings of Fact mandated by Section 26-24-1, et seq., Utah Code Annotated (1953), should have some support in the evidence so presented. Therefore, the standard imposing the charges should be declared invalid, and null and void ab initio.

3. The provisions of the "Food Service/Food Establishment Licensing Fee Standards" amount to a tax. The Board is not authorized to levy taxes and, therefore, the standard should be declared to be invalid, and null and void ab initio.

4. Any charges previously collected by defendant based upon the "Food Service/Food Establishment Licensing Fee Standards" were improperly assessed and should be returned to plaintiffs and others paying the same.

5. Defendant should be restrained from assessing further charges pursuant to the "Food Service/Food Establishment Licensing Fee Standards".

Dated this 18 day of August, 1987.

BY THE COURT

Richard H. Moffat
District Court Judge

ATTEST

H. [illegible] -v
Clerk

By K [illegible]
Deputy Clerk

APPROVED AS TO FORM:

Counsel for Defendant

CERTIFICATE OF DELIVERY

I hereby certify that I hand delivered a copy of the foregoing Findings of Fact and Conclusions of Law to the office of Thomas L. Christensen, Deputy County Attorney, County Complex, 2100 South State Street, Salt Lake City, Utah 84105, this 3rd day of August, 1987.

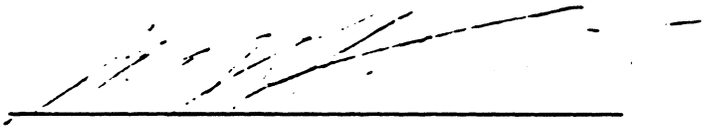

EXHIBIT C

FOOD SERVICE/FOOD ESTABLISHMENT

LICENSING FEE STANDARDS

This Standard is adopted this _____ day of _____, 1986, by the Salt Lake City-County Board of Health, a local board of health organized pursuant to Section 26-24-9, U.C.A. (1953).

W I T N E S S E T H :

WHEREAS, it has become necessary to establish a fee schedule for food/food service establishments in Salt Lake County to pay a portion of Salt Lake City-County Health Department's reasonable expenses of inspecting and enforcing State and local food rules and regulations : and

WHEREAS, the Salt Lake City-County Health Department is authorized to adopt this standard pursuant to Section 26-24-14 (14) U.C.A. (1953), and Salt Lake City-County Health Department Regulation No. 4 and No. 5, and No. 6, Food Service Establishments and Food Establishments, Sections 4.2.

NOW, THEREFORE, The Salt Lake City-County Board of Health ordains as follows :

Section I. Definitions:

Food Service Establishments - Restaurants, restaurants/clubs, restaurants/fast food, cafeterias, snack bars/fountains, nursing homes, day care centers, bars, lounges, ice cream stores, or

any place where food is prepared and intended for individual portion service, whether the consumption is on or off the premises or there is a charge for the food. This does not include private homes where food is prepared or served for individual family consumption.

Food Establishments - Grocery stores, bakeries, candy factories, bottling plants, convenience stores, canning factories, meat processing plants, cold storage warehouses, food storage warehouses, or similar establishments where food products are manufactured, canned, packed, processed, stored, transported, prepared, sold, or offered for sale.

Temporary Food Service Establishments - Food Service establishments that operate at a fixed location for not more than 14 consecutive days in conjunction with a single event or celebration.

Service Bays - Include, but are not limited to, cash register stands, drive-up windows, walk-up windows, and/or different points from which food is dispensed or served to the public. Waited tables are not considered service bays.

Seats - Seating that is available for the public within a food service establishment. The number of seats shall be determined by the listing on the business license application or by physical count by the regulatory authority.
Banquet seating, not used for everyday seating, shall not be included in the total number of seats. The number of beds, in lieu of the number of seats, may be used to classify hospitals and correctional institutions.

Square Footage -	Square footage will be determined on the basis of the outside wall measurements of the food establishment.

Section II. Annual Fees. All food service/food establishments in Salt Lake County shall be classified according to the following criteria into one of six (6) categories for the purpose of assessing annual fees:

Category I		$40.00	Day Care centers, nursing homes and food service/food establishments providing either one service bay or zero to ten seats.
Category II		$60.00	Food service/food establishments providing either two service bays or eleven to fifty seats.
Category III		$80.00	Food service/food establishments providing either three service bays or fifty-one to seventy-five seats.
Category IV		$100.00	Food service/food establishments providing either four or more service bays or seventy-six or more seats.
Category V	(a)	$40.00	Food establishments with under 2,000 square feet.
	(b)	$60.00	2,000 to 3,000 square feet.
	(c)	$80.00	3,000 to 5,000 square feet.
	(d)	$100.00	5,000 square feet or more.
Category VI		$10.00 flat + $5.00 per day (not to exceed $35 total)	Temporary food service establishments operating fourteen days or less.

Section III. General Provisions:

1. All fees shall be paid annually and are due in advance on the 1st day of January of each year,

provided, however, that when a business license application is made after the 1st day of July, except under Category VI, the fee for the first year shall be at the rate of 50 per cent (50%) of the annual fee. No fees, or any part thereof, may be refunded or transferred.

2. The Salt Lake City-County Health Department shall attempt to notify each food establishment/food service establishment prior to the date on which fees are due of its determination of category assignment, and the amount of fees due. Fees unpaid after forty-five (45) days of the due date will be assessed a penalty of twenty-five per cent (25%) of the amount of such fees which shall be added to the original amount. Failure to pay annual fees and additional charges after ninety (90) days of the due date may result in revocation or suspension of food/food service permits and the right to operate. A twenty-five per cent (25%) charge will be assessed for each returned check.

3. Consistent with Health Department Regulations No. 4, Section 4.2, and No. 5, Section 4.2, and No. 6, Section 4.2, the Salt Lake City-County Health Department shall provide notice and opportunity for a hearing to consider or reconsider the revocation or suspension of the right to operate due to nonpayment of fees.

4. In determining food establishment/food service establishment categories, the Salt Lake City-County Health Department may classify hospitals, correctional facilities, and other institutions by seats, beds, or other reasonable criteria. Day care centers and nursing homes will be classified as Category I. Food establishments that have multiple units under one roof will be classified by square footage.

5. If any provision, clause, sentence, or paragraph of this standard or the application thereof shall be held to be invalid, such invalidity shall not affect the other provisions or applications of this standard. The valid part of any clause, sentence, or paragraph of this standard shall be given independence from the invalid provisions or application and to this end the provisions of this standard is declared to be severable.

Section IV. This Standard shall become effective fifteen (15) days after its passage.

APPROVED and ADOPTED on the day and year first above written.

SALT LAKE CITY-COUNTY BOARD OF HEALTH

By: _____
Chairman

_____ Voting _____

_____ Voting _____

_____ Voting _____

(0887J)

(R-73-74)

SALT LAKE CITY-COUNTY HEALTH DEPARTMENT

FOOD SERVICE/FOOD ESTABLISHMENT
LICENSING FEE STANDARDS

FINDING OF FACT AND CONCLUSIONS OF LAW

1. The Salt Lake City-County Health Department carries out responsibilities of food inspection in Salt Lake County. This authority is granted to the Salt Lake City-County Health Department by the Local Health Department Act of the Utah Code Annotated Title 26, Chapter 24.

2. Section 26-24-14(14) allows local health departments to charge fees to carry out its responsibility.

3. On September 10, 1986, a public hearing was held in order to receive public comment regarding the fees. Notice of the public hearing was advertised August 10 and 23, 1986, in the Salt Lake Tribune and Deseret News at least 15 days prior to the public hearing.

4. A summary of comments received at the public hearing was presented to the Board of Health at its regular scheduled Board of Health Meeting on October 2, 1986.

5. While objection was raised by several individuals as to the charging of the fees, no information was brought forward which demonstrated that the proposed fees standard was contrary to state or local laws, was excessive, or not tied directly to the cost of the inspection program and to be used to support this cost.

6. The Board finds that the proposed Food Inspection Fee Standard is consistent with the charging of fees in other Salt Lake City-County Health Department regulations such as the Asbestos Regulation, Massage Parlor Regulations, Swimming Pool Regulations, etc., and that the proposed fee does not single out food establishments in the charging of fees.

7. The actual cost of the Food Inspection Program at the Salt Lake City-County Health Department is $453,000. Current fees for food handler permits total $25,000. Cost of the Food Inspection Program not covered by current fees totals $430,000.

8. The proposed fee schedule will generate approximately $156,000, which is approximately one-third the total cost of the Food Inspection Program.

9. Money collected by the proposed fee will be deposited in an account of the Health fund set up specifically to receive monies generated by the proposed standard.

10. Funding to support the Food Inspection Program will be drawn from the account mentioned above in Item #9.

The Salt Lake City-County Board of Health, therefore, concludes that the proposed food fees are reasonable and consistent with other fees charged by the Department, that proper procedures have been followed in developing the fees pursuant to Section 26-24-20, that the proposed fees will be used to support the Food Inspection Program, and that the fees are legal and meet the intent of Section 26-24-14. Therefore, the Board adopts the fees standard as attached this 2nd day of October, 1986.

L. Jed Morrison, M.D., Chairman
Salt Lake City-County Board of Health

CONTROLLING PROVISIONS

26-1-6, Fee schedule adopted by department.

The department may adopt a schedule of fees that may be assessed for services rendered by the department, provided that such fees shall be reasonable and fair and shall be submitted to and approved by the legislature as part of the department's annual appropriations request. Such fees shall be paid into the state treasury in accordance with Section 63-38-9.

* * *

26-24-4, County health departments.

The governing body of each county shall create and maintain a local health department.

* * *

26-24-14, Utah Code Ann. Powers and duties of departments.

(14) establish and collect appropriate fees, to accept, use and administer all federal, state, or private donations or grants of funds, property, services, or materials for public health purposes, and to make such agreements, not inconsistent with law, as may be required as a condition to receiving such donation or grant;

CONTROLLING PROVISIONS (con't)

26-24-15, Utah Code Ann. Apportionment of department costs -- Contracts with state department to provide services--Requirement for percentage match of state funds by local health departments.

(1) The cost of establishing and maintaining a local health department may be apportioned among the participating municipalities and counties on the basis of population in proportion to the total population of all municipalities and counties within the jurisdiction of the local health department, or upon such other bases as is agreeable to the participating counties and municipalities. For purposes of this subsection, "population" means population estimates prepared by the state planning coordinator. In addition, money available from fees, contracts, surpluses, grants, and donations may be used to establish and maintain local health departments.

* * *

26-24-18, Utah Code Ann. Health department fund-- Sources-- Uses.

The treasurer of a health department shall, on organization of the department, create a health department fund to which shall be credited any moneys appropriated or otherwise made available by participating counties, cities, or other local political subdivisions and any moneys received from the state, federal government, or from surpluses, grants, fees or donations for local health purposes. Any moneys credited to this fund shall be expended only for maintenance and operation of the local health department claims or demands against the fund shall be allowed on certification by the health officer or other employee of the local health department designed by the board.

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CONTROLLING PROVISIONS (con't)

26-24-20, Utah Code Ann. Regulations adopted by local board --Procedure--Administrative and judicial review of actions.

(1) The board may adopt rules, regulations, and standards, not in conflict with rules of the department, necessary for the promotion of public health, environmental health qualify, injury control and the prevention of outbreaks and spread of communicable and infectious diseases, that shall have the affect of law. Such rules, regulations and standards when adopted shall supersede existing local rules, regulations, standards and ordinances pertaining to similar subject matter.

(2) The board shall provide public hearings prior to the adoption of any rule, regulation or standard. Notice of any such public hearing shall be published at least twice in a newspaper of general circulation in the area within the jurisdiction of the local health department.

(3) The hearings may be conducted by the board at a regular or special meeting, or the board may appoint hearing officers, who shall have power and authority to conduct hearings in the name of the board at a designated time and place. A record or summary of the proceedings of any hearing shall be taken and filed with the board, together with findings of fact, conclusions of law, and the order of the board or hearing officer. In any hearing, a member of the board or hearing officer shall have the power to administer oaths, examine witnesses, and issue notice of the hearings or subpoenas in the name of the board requiring the testimony of witnesses and the production of evidence relevant to any matter in the hearing.

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of May, 1989, ten (10) true and correct copies of the foregoing were filed with the Supreme Court Clerk, and two (2) copies were mailed to:

Gary E. Atkin
ATKIN & ANDERSON
311 South State Street
Suite 380
Salt Lake City, Utah 84111

Thomas J. Whitney